

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA)	
)	8:08CR471
Plaintiff,)	
)	
vs.)	MOTION IN LIMINE
)	
DELROY FISCHER,)	
)	
Defendant.)	

Comes now the United States of America, by and through the undersigned Assistant United States Attorney, and respectfully requests that any evidence of underlying conviction be excluded from trial. In support of this motion, the United States offers the following:

1. The United States has received notice from the defendant that he intends to introduce the Buffalo County Court file pertaining to the Defendant's underlying conviction as an exhibit at trial.

2. The United States believes that the intent in offering the file is to put before the jury a particular order signed by a Buffalo County Judge in July 2009. The order states that the state statute under which the Defendant was convicted did not include a finding of an assault on an "intimate partner." Additionally, the order stated that the Defendant's 2006 conviction did not involve any factual findings of "domestic assault."

3. This Court has already concluded that the Defendant's underlying conviction satisfied 18 U.S.C. § 921(a)(33)(A)(ii). (Filing 42). Additionally, the Buffalo County Court Order does not affect this Court's review of the predicate conviction. This Court properly referred to the plea colloquy and determined that the factual basis the Defendant plead to contained the use of physical force committed by a person with whom the victim shares a child in common. United States v. Howell, 531 F.3d at 623 (citing Shepard v. United States, 544 U.S. 13, 16 (2005)).

4. The Eighth Circuit has repeatedly held that whether an underlying conviction qualifies as a predicate misdemeanor for a federal charge is a question of law for the district court

to decide. United States v. Boaz, 558 F.3d 800, 805 (8th Cir. 2008); United States v. Stanko, 491 F.3d 408, 412 (8th Cir. 2007). In fact, in United States v. Howell, 531 F.3d 621, 623 (2008), the Eighth Circuit acknowledged that whether an underlying Missouri conviction qualified as a predicate misdemeanor for a federal charge under § 921(a)(33)(A)(ii) was “a question of law for the court, rather than one of fact for the jury.”

WHEREFORE, the United States respectfully requests that any evidence of underlying conviction be excluded from trial.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Carlos Monzon

s/Sandra L. Denton
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